

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
Re: Appeal to the Board of Patent Appeals and Interferences

Appellants: MacDonald et al.)	Examiner: Ginger T. Chapman
)	
Serial No: 10/723,761)	Group Art Unit: 3761
)	
Filed: November 26, 2003)	Deposit Account No: 04-1403
)	
Confirmation No: 9700)	Customer No: 22827
)	
Title: Odor Control in Personal Care Products)	Attorney Docket No: KCX-1068 (19800)
)	

1. ☐ **NOTICE OF APPEAL**: Pursuant to 37 CFR 41.31, Applicant hereby appeals to the Board of Appeals from the decision dated _____ of the Examiner twice/finally rejecting claims _____.
2. ☒ **BRIEF** on appeal in this application pursuant to 37 CFR 41.37 is transmitted herewith (1 copy).
3. ☐ An **ORAL HEARING** is respectfully requested under 37 CFR 41.47 (due within two months after Examiner's Answer).
4. ☐ Reply Brief under 37 CFR 41.41(b) is transmitted herewith (1 copy).
5. ☐ "Small entity" verified statement filed: [] herewith [] previously.

6.	FEE CALCULATION:	Fees
	If box 1 above is X'd enter \$ 510.00	\$ <u>0.00</u>
	If box 2 above is X'd enter \$ 510.00	\$ <u>510.00</u>
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	If box 4 above is X-d enter -0- (no fee)	\$ <u>0.00</u>

PETITION is hereby made to extend the original due date of August 18, 2008, hereby made for an extension to cover the date this response is filed for which the requisite fee is enclosed (1 month \$120; 2 months \$460; 3 months \$1,050; 4 months \$1,640, 5 months \$2,230

	\$ <u>0.00</u>
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SUBTOTAL:	\$ <u>510.00</u>
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<u>Less</u> any previous extension fee <u>paid</u> since above original due date.	-	\$ <u>0.00</u>
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Less any previous fee paid for prior Notice of Appeal since Board did not render a decision on the merits. MPEP § 1204.01	-	\$ <u>0.00</u>
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Less any previous fee paid for submitting Brief on prior Appeal since Board did not render a decision on the merits. MPEP § 1204.01	-	\$ <u>0.00</u>
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SUBTOTAL:	\$ <u>510.00</u>
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If "small entity" verified statement filed ☐ previously,
☐ herewith, enter one-half (1/2) of subtotal and subtract - \$ 0.00

TOTAL FEE ENCLOSED: \$ 510.00

- ☐ Fee enclosed.
- ☐ Charge fee to our Deposit Account/Order Nos. in the heading hereof (for which purpose one additional copy of this sheet is attached)
- ☒ Charge to credit card (attach Credit Card Payment Form – PTO 2038)
- ☐ Fee NOT required since paid in prior appeal in which the Board of Appeals did not render a decision on the merits.

The Commissioner is hereby authorized to charge any fee specifically authorized hereafter, or any fees in addition to the fee(s) filed, or asserted to be filed, or which should have been filed herewith or concerning any paper filed hereafter, and which may be required under Rules 16-18 (deficiency only) now or hereafter relative to this application and the resulting official document under Rule 20, or credit any overpayment, to our Account No. shown in the heading hereof. This statement does not authorize charge of the issue fee in this case.

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Date: August 18, 2008

I hereby certify that this correspondence and all attachments and any fee(s) are being electronically transmitted via the internet to the U.S. Patent and Trademark Office using the Electronic Patent Filing System on August 18, 2008.

Sandra S. Perkins

(Typed or printed name of person transmitting documents)



(Signature of person transmitting documents)

PATENT
ATTORNEY DOCKET NO: KCX-1068 (19800)

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Honorable Commissioner for Patents
U.S. Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450

BRIEF ON APPEAL

Appellants submit the following brief on appeal in accordance with 37 C.F.R. §
41.37:

1. REAL PARTY IN INTEREST

The real party in interest in this matter is the assignee of record, Kimberly-Clark
Worldwide, Inc.

2. RELATED APPEALS AND INTERFERENCES

There are no other appeals or interferences known to the Appellants or the
Appellants' legal representative which will directly affect or be directly affected by or
have a bearing on the Board's decision in the pending appeal.

3. STATUS OF CLAIMS

Currently, claims 17, 18, 22-28, and 32 remain pending in the present application including independent claim 17. Claims 1-16, 19-21, 29-31, and 33 were previously cancelled from the present application. All the pending claims are attached hereto in the Claims Appendix.

In the Final Office Action of March 19, 2008, claims 17, 18, 22-28, and 32 were finally rejected under 35 U.S.C. § 103(a).

The rejection of claims 17, 18, 22-28, and 32 is hereby appealed.

4. STATUS OF AMENDMENTS

All amendments have been entered into the record.

5. SUMMARY OF CLAIMED SUBJECT MATTER

In general, the present application is directed to a personal care product that provides odor control. See, e.g., Title. For example, independent claim 17 is directed to a personal care product **2**. See, e.g., pg. 1, lines 7-8. The personal care product **2** includes a liquid impervious baffle **12**, a liquid pervious liner **14**, an absorbent core **16** positioned between the baffle **12** and the liner **14**, and an odor sorbent substrate **37** positioned between the baffle **12** and absorbent core **16**. See, e.g., pg. 5, lines 3-24; Figs. 1-6. The odor sorbent substrate **37** is wrapped around the absorbent core **16** in a manner than one or more sides are left open. See, e.g., Fig. 6. The substrate **37** has a surface that is coated with a durable activated carbon ink. See, e.g., pg. 4, lines 1-7; pg. 11, line 4 – pg. 17, line 7. The activated carbon ink consists essentially of activated carbon particles and a binder. See, e.g., pg. 2, lines 3-10; pg. 11, lines 5-8.

6. GROUND OF REJECTION TO BE REVIEWED ON APPEAL

I. Claims 17, 18, and 25-27 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 3,939,838 (hereinafter "Fujinami") in view of U.S. Patent No. 3,490,454 (hereinafter "Goldfarb").

II. Claims 28 and 32 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Fujinami in view of Godfarb and further in view of U.S. Patent No. 6,740,406 (hereinafter "Hu").

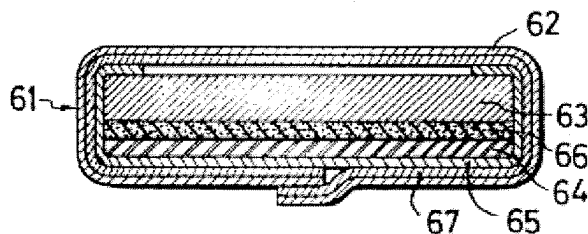
III. Claims 22-24 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Fujinami in view of Godfarb and further in view of U.S. Patent No. 4,565,727 (hereinafter "Giglia").

7. ARGUMENT

Appellants respectfully submit that the presently pending claims are patentable over the cited references.

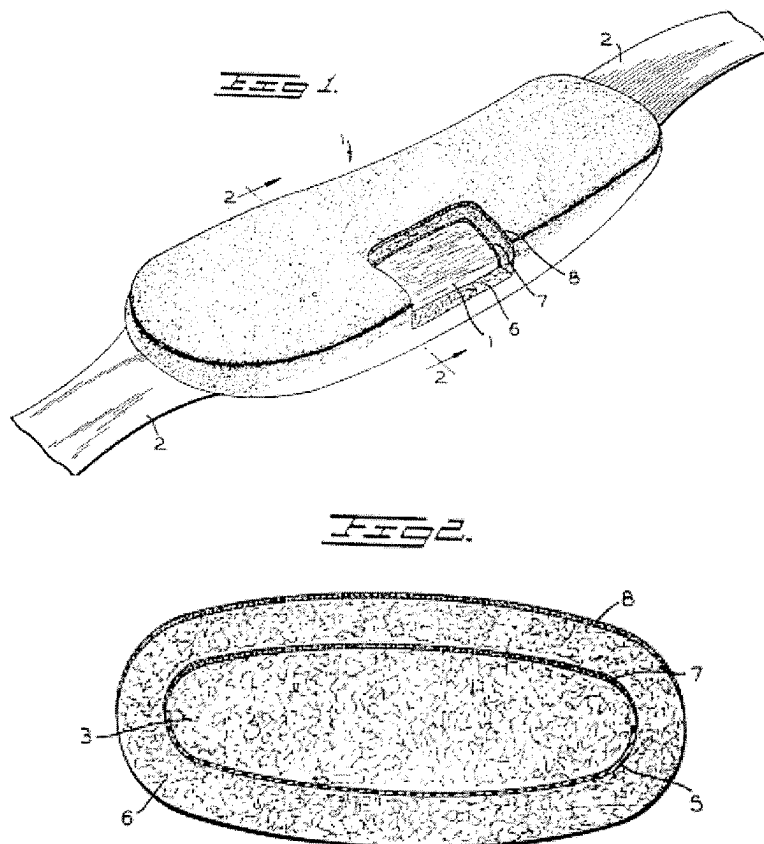
I. **Claims 17, 18, and 25-27 are patentable over Fujinami in view of Goldfarb.**

Fujinami is directed to a sanitary napkin that includes a material for deodorizing menstrual fluid. One example of the sanitary napkin 61 is shown in Fig. 6, which is reproduced below:



As illustrated, the napkin 61 includes an absorbent layer 63 for absorbing menstrual fluid and a water-proofing layer 64 for preventing the absorbed fluid from permeating through the undersurface of the napkin. A deodorizer is interposed between the absorbent layer 63 and the water-proofing layer 64. The deodorizer is *contained in* a sheet 66 made of cellulose fiber. Fujinami indicates that the deodorizer may be *mixed* with the cellulose fiber, or *dispersed* into a cotton web, plied body of thin paper, or powdery material made of cellulose fiber. Col. 3, lines 16-34.

Goldfarb is directed to catamenial products having a coating of microcapsules containing medicants. Figs. 1 and 2 are reproduced below:



As illustrated, a catamenial device 1 includes an absorbent core 3 enclosed within a water repellant film 5 and further enclosed within a layer of creped tissue 6. Each layer

5 and 6 is provided with layers of encapsulated microscopic capsules 7 and 8 along the upper layers.

A. Independent claim 17 is patentable over Fujinami in view of Goldfarb.

Independent claim 17 contains the limitations that the personal care product comprises:

an odor sorbent substrate positioned between the baffle and absorbent core and wrapped around the absorbent core in a manner that one or more sides are left open, wherein the substrate has a surface that is coated with a durable activated carbon ink, the activated carbon ink consisting essentially of activated carbon particles and a binder.

In comparison to independent claim 17, as admitted in the Office Action, Fujinami fails to teach an odor sorbent substrate coated with an activated carbon ink. In this regard, Goldfarb was cited as teaching a personal care product that has a surface coated with an odor sorbent. Furthermore, with respect to the binder limitation, the Office Action asserts that "when active carbon is mixed with the cellulose of Fujinami, the cellulose is a binder." Final Office Action, para. 7. Additionally, the Office Action asserts that Fujinami discloses an odor sorbent substrate wrapped around the absorbent core in a manner that one or more sides are left open.

1. Fujinami in combination with Goldfarb fails to teach a coating of a durable activated carbon ink.

To establish a *prima facie* case of obviousness, in addition to other requirements, the prior art references, when combined, must teach or suggest all the claim limitations. *In re Vaeck*, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991); See also, MPEP § 2143.03. Independent claim 17 requires an odor sorbent substrate coated with a

durable activated carbon ink. Appellants respectfully submit that neither Fujinami nor Goldfarb discloses or suggests such a limitation.

The Office Action states that “Fujinami teaches the substrate is impregnated with the activated carbon ink, thus the interior surface of the Fujinami substrate is deemed to be coated.” Appellants respectfully disagree. Fujinami discloses mixing of the deodorizer with cellulose fiber or dispersing into a cotton web. Col. 3, lines 35-46; See *also* Figs. 2-6 (illustrating uniform dispersion of the deodorizer). In contrast, claim 17 calls for coating the surface of a substrate with a durable activated carbon ink. Indeed, one of ordinary skill in the art would expect that the 80 to 240 mesh activated carbon powder¹ would readily rub off of the surface of a cellulose fiber sheet due to its relatively large particle size.

As a secondary argument, the Office Action cites Goldfarb as disclosing the motivation for one of skill in the art to form the sorbent of Fujinami as a coating. Appellants respectfully disagree. Neither reference discloses activated carbon ink as claimed by Appellants. Indeed, as noted above, independent claim 17 further defines the activated carbon ink as consisting essentially of activated carbon particles and a binder. The Office Action asserts that the odor sorbent substrate of Fujinami doubles as the binder.² Thus, by the Examiner's reasoning, the odor sorbent substrate (cellulose fibers with 80 to 240 mesh activated carbon powder dispersed therein) serves to anticipate Appellants' claim limitation of activated carbon ink. Such reasoning may not be sustained.

¹ Fujinami, Col. 3, line 37

² This assertion will be addressed *infra*.

The Patent and Trademark Office (“PTO”) determines the scope of claims in patent applications not solely on the basis of the claim language, but upon giving claims their broadest **reasonable** construction “in light of the specification as it would be interpreted by one of ordinary skill in the art.” *In re Am. Acad. of Sci. Tech. Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir. 2004). The broadest **reasonable** interpretation of the claims must also be consistent with the interpretation that those skilled in the art would reach. *In re Cortright*, 165 F.3d 1353, 1359 (Fed. Cir. 1999). It is simply not **reasonable** to assert that the odor sorbent substrate of Fujinami doubles as Appellants’ claimed carbon ink, especially “in light of the specification.” First, independent claim 17 requires both an odor sorbent substrate and a coating of activated carbon ink thereon. The cellulose fibers with activated carbon powder dispersed throughout of Fujinami can not act to anticipate **both** limitations. Second, Appellants submit that one skilled in the art could not **coat** the structure the Examiner has indicated is equivalent to Appellants’ activated carbon ink as required by independent claim 17.

Additionally, contrary to the Office Action’s assertion, Goldfarb does **not** provide motivation to one skilled in the art to form the sorbent of Fujinami as a coating as claimed by Appellants. While Goldfarb teaches a coating of medicated capsules on a surface, Goldfarb additionally teaches the **release** of such capsules stating “the capsules are adapted to be releasable by pressure, by the presence of heat such as body heat, chemical reaction with the menstrual fluid, or equivalent releasing mechanisms.” Col. 5, lines 35-39. Thus, any proper combination of Fujinami with Goldfarb would merely yield relatively large activated carbon particles on the surface

with no binder. As such, no proper combination of the references can yield an odor sorbent substrate coated with a durable activated carbon ink.

2. Fujinami in combination with Goldfarb fails to teach a binder.

To establish a *prima facie* case of obviousness, in addition to other requirements, the prior art references, when combined, must teach or suggest all the claim limitations. *In re Vaeck*, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991); *See also*, MPEP § 2143.03. Independent claim 17 requires an activated carbon ink consisting essentially of activated carbon particles and a binder. Appellants respectfully submit that neither Fujinami nor Goldfarb discloses or suggests such a limitation.

The Examiner asserts that “with respect to the limitation of binder, when active carbon is mixed with the cellulose of Fujinami, the cellulose is a binder.” Final Office Action, para. 7. First, as noted above, claim 17 contains the limitations of an odor sorbent substrate and the substrate being coated with a durable activated carbon ink (the ink consisting essentially of activated carbon particles and a binder). As such, either the cellulose of Fujinami is a substrate or it is a binder; it may not serve to anticipate both claim limitations.

Second, the Examiner purports that since the active carbon of Fujinami is mixed with the cellulose, the cellulose is the binder. However, in the immediately preceding sentence in the Office Action, the Examiner states “it would have been obvious to one having ordinary skill in the art at the time the invention was made to form the sorbent of Fujinami as a coating as taught by Goldfarb.” Final Office Action, para. 6. If such a modification was made to Fujinami, the Examiner effectively eliminates the “binder” as

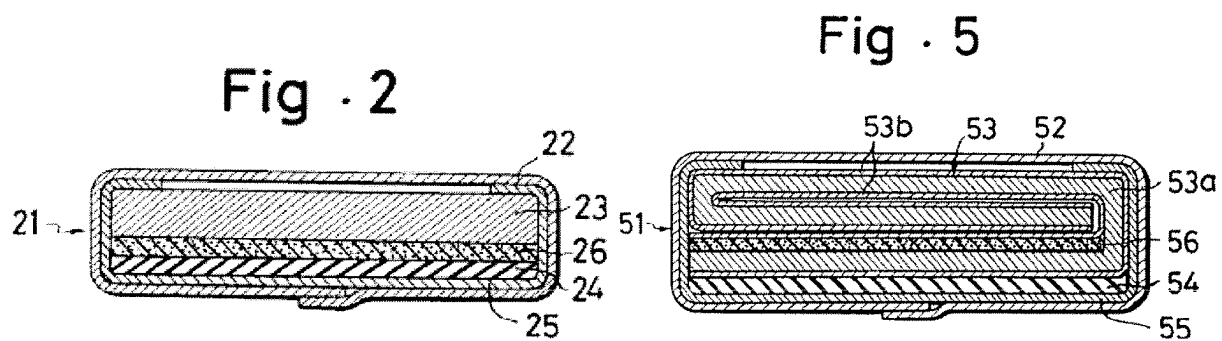
the carbon would be coated on the surface and not “mixed with the cellulose.” Simply stated, the Office may not have it both ways.

Additionally, as noted above, Goldfarb provides no motivation to bind anything to a surface as Goldfarb teaches the release of the coating stating “the capsules are adapted to be releasable by pressure, by the presence of heat such as body heat, chemical reaction with the menstrual fluid, or equivalent releasing mechanisms.” Col. 5, lines 35-39. As such, no proper combination of the references can yield an odor sorbent substrate coated with a **durable** activated carbon ink consisting essentially of activated carbon particles and a binder.

3. Fujinami in combination with Goldfarb fails to teach an odor sorbent substrate wrapped around an absorbent core.

To establish a *prima facie* case of obviousness, in addition to other requirements, the prior art references, when combined, must teach or suggest all the claim limitations. *In re Vaeck*, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991); See also, MPEP § 2143.03. Independent claim 17 requires an odor sorbent substrate positioned between the baffle and the liner and wrapped around the absorbent core in a manner that one or more sides are left open. Appellants respectfully submit that neither Fujinami nor Goldfarb discloses or suggests such a limitation.

The Office Action points to Fig. 2 of Fujinami for disclosing an odor sorbent substrate positioned between the baffle and the absorbent core and then points to Fig. 5 of Fujinami as disclosing the odor sorbent substrate wrapped around the absorbent core in a manner that one or more sides are left open. Figs. 2 and 5 are reproduced below:



As illustrated, in Fig. 2, the deodorizer containing sheet 26 is positioned between the water proofing layer 24 and the absorbent layer 23. In Fig. 5, the deodorizing containing sheet 56 appears to be positioned between a spirally folded covering web 53a and a thin sheet 53b that provides elasticity in the direction of thickness. Appellants assume that the Examiner purports to somehow combine Fig. 2 with Fig. 5 to obtain Appellants claim limitation as no explanation was provided in the Final Office Action. Appellants respectfully submit that no proper combination of elements would result in Appellants claim limitation of an odor sorbent substrate positioned between the baffle and the liner and wrapped around the absorbent core in a manner that one or more sides are left open. Furthermore, contrary to the Examiner's assertion, Fig. 5 does not illustrate an odor sorbent substrate wrapped around an absorbent core in a manner that one or more sides are left open. For instance, one embodiment of this claim limitation is illustrated in Appellants' Fig. 6 reproduced below:

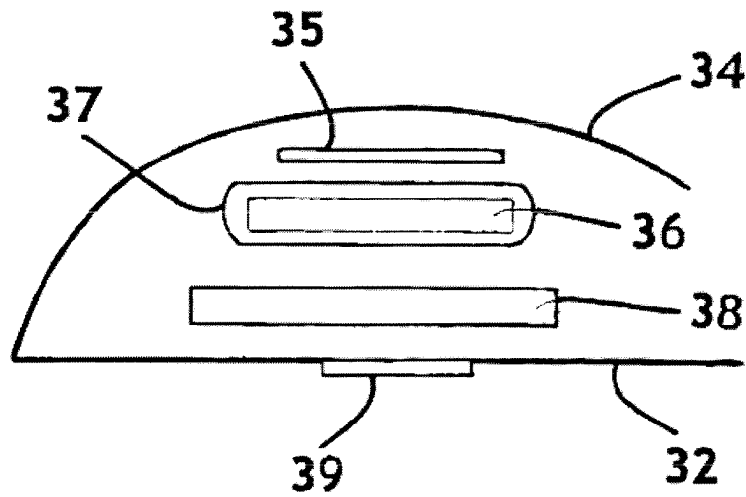


FIG. 6

As illustrated, the odor sorbent substrate **37** is wrapped around the absorbent core **36** in a manner that one or more sides are left open. Contrasting with Fig. 5 of Fujinami, it is readily apparent that there is no wrapping around of the absorbent core. If anything, Fig. 5 of Fujinami appears to depict the exact opposite of Appellants' claim language; i.e., the absorbent layer 53 appears to encompass the deodorizer containing sheet 56. The deodorizer containing sheet 56 is certainly not wrapped around anything.

Appellants urge that all words in the claim language must be considered to establish a *prima facie* case of obviousness. Indeed the Courts have held that "all words in a claim must be considered in judging the patentability of that claim against the prior art." *In re Wilson*, 424 F.2d 1382, 1385 (CCPA 1970). Thus, the Examiner has not established a *prima facie* case of obviousness as none of the references disclose or suggest an odor sorbent substrate wrapped around an absorbent core.

4. There is no motivation to combine Fujinami with Goldfarb.

As indicated above, Fujinami is directed to an article for treating menstrual fluid. The article contains a deodorizer which may be active carbon. Col. 3, lines 35-43. Furthermore, Fujinami teaches that the active carbon deodorizer may be contained in sheets made of cellulose fiber interposed between the respective absorbent layers, in the water-proofing layer, or in the absorbent layer. Col. 3, lines 16-35. However, Fujinami does not disclose containing the deodorizer on the surface of the article, nor does Fujinami indicate any desire to **release** the deodorizer from the article. In stark contrast, Goldfarb discloses "Catamenial Products Having a Coating of Ruptureable Microcapsules Containing Medicants." Title.

Appellants respectfully submit that there is no motivation to combine the ruptureable microcapsule coating of Goldfarb with the contained deodorizer of Fujinami. Plainly, the Examiner's only incentive or motivation for so modifying Fujinami using the teachings of Goldfarb in the manner suggested in the Final Office Action results from using Appellant's disclosure as a blueprint to reconstruct the claimed invention out of isolated teachings in the prior art, which is improper under 35 U.S.C. § 103. The U.S. Supreme Court recently reaffirmed that "[a] factfinder should be aware, of course, of the distortion caused by hindsight bias and must be cautious of argument reliant upon ex post reasoning." *KSR Int'l Co. v. Teleflex Inc.*, 127 S. Ct. 1727; *See also, Graham v. John Deere Co.*, 383 U.S. at 36. Only with Appellants' specification could the structure of claim 17 be attained, and any attempt to arrive at the structure of claim 17 through study of the cited references is only reachable from improper hindsight analysis after viewing Applicants' specification.

B. Claims 18 and 25-27 are patentable over Fujinami in view of Goldfarb.

If an independent claim is nonobvious under 35 U.S.C. § 103, then any claim depending therefrom is nonobvious. *In re Fine*, 837 F.2d 1071 (Fed. Cir. 1988). Claims 18 and 25-27 depend from independent claim 17. As such, Appellants submit that claims 18 and 25-27 are patentable over the cited reference for at least the reasons noted above with respect to independent claim 17.

II. Claims 28 and 32 are patentable over Fujinami in view of Goldfarb and further in view of Hu.

If an independent claim is nonobvious under 35 U.S.C. § 103, then any claim depending therefrom is nonobvious. *In re Fine*, 837 F.2d 1071 (Fed. Cir. 1988). Claims 28 and 32 depend from independent claim 17. Hu fails to remedy the deficiencies of Fujinami and Goldfarb as noted above with respect to independent claim 17. As such, Appellants submit that claims 28 and 32 are patentable over the cited references for at least the reasons noted above with respect to independent claim 17.

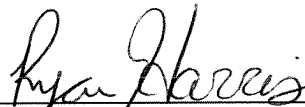
III. Claims 22-24 are patentable over Fujinami in view of Goldfarb and further in view of Giglia.

If an independent claim is nonobvious under 35 U.S.C. § 103, then any claim depending therefrom is nonobvious. *In re Fine*, 837 F.2d 1071 (Fed. Cir. 1988). Claims 22-24 depend from independent claim 17. Giglia fails to remedy the deficiencies of Fujinami and Goldfarb as noted above with respect to independent claim 17. As such, Appellants submit that claims 22-24 are patentable over the cited references for at least the reasons noted above with respect to independent claim 17.

In conclusion, Appellants request favorable action and allowance of the presently pending claims.

Respectfully requested,

DORITY & MANNING, P.A.

A handwritten signature in black ink, appearing to read "Ryan P. Harris", is written over a horizontal line.

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Date: August 18, 2008

8. CLAIMS APPENDIX

1-16. (Cancelled)

17. (Rejected) A personal care product comprising:

a liquid impervious baffle;

a liquid pervious liner;

an absorbent core positioned between the baffle and the liner; and

an odor sorbent substrate positioned between the baffle and absorbent core and wrapped around the absorbent core in a manner that one or more sides are left open, wherein the substrate has a surface that is coated with a durable activated carbon ink, the activated carbon ink consisting essentially of activated carbon particles and a binder.

18. (Rejected) The personal care product of claim 17, wherein the personal care product is selected from the group consisting of diapers, training pants, absorbent underpants, adult incontinence products, and feminine hygiene products.

19-21. (Cancelled)

22. (Rejected) The personal care product of claim 17, wherein the activated carbon particles are present in an amount of between about 2 and 80 wt.% of the substrate on a dry basis.

23. (Rejected) The personal care product of claim 17, wherein the activated carbon particles are present in an amount of between about 5 and 75 wt.% of the substrate on a dry basis.

24. (Rejected) The personal care product of claim 17, wherein the activated carbon particles are present in an amount of between about 10 and 30 wt.% of the substrate on a dry basis.

25. (Rejected) The personal care product of claim 17, wherein the substrate contains a film, nonwoven web, coform web, airlaid paper web, wetlaid paper web, or a combination thereof.

26. (Rejected) The personal care product of claim 17, wherein the substrate contains a wetlaid or airlaid paper web.

27. (Rejected) The personal care product of claim 17, wherein the substrate contains a film.

28. (Rejected) The personal care product of claim 17, wherein the binder is a styrene-acrylic binder.

29-31. (Cancelled)

32. (Rejected) The personal care product of claim 17, wherein the ink is applied to the substrate as an aqueous solution.

33. (Cancelled)

9. EVIDENCE APPENDIX

None

10. RELATED PROCEEDINGS APPENDIX

None